83-1060

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No._____

In The

Supreme Court of the United States

OCTOBER TERM, 1983

LYNN LAWTHER, JR.

Petitioner

v.

JACOBS MANUFACTURING COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK P. HERNANDEZ
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QUESTION PRESENTED

1. WHETHER THE ACCEPTANCE OF AN UNTIMELY POST TRIAL MOTION AND THE SUBSEQUENT MODIFIED ORDER BY THE TRIAL COURT OF A PREVIOUS ORDER AND JUDGEMENT CONSTITUTES UNIQUE CIRCUMSTANCES SO AS TO REQUIRE A COURT OF APPEALS TO HEAR THE CASE ON THE MERITS?

PARTIES

Lynn Lawther, Jr.

Jacobs Manufacturing Company

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

. . . . . .

Lynn Lawther, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on August 18, 1983, dismissing Petitioner's appeal. (Appendix A). The judgment of the Court of Appeals for the Fifth Circuit denying Petitioner's Motion For Reconsideration was issued on September 23, 1983. (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 23, 1983. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF APPELLATE PROCEDURE

The Federal Rules of Civil Procedure pertaining to this appeal are Rule 59(e) and the Federal Rules of Appellate Procedure are Rule 4(a)(1) and Rule 4(a)(4).

STATEMENT

The Petitioner was terminated by the Respondent after many years of service at a time when Petitioner was nearing the age of fifty. Petitioner alleged that he had been terminated in violation of the Age Discrimination in Employment Act and timely filed his Original Complaint in the District Court after having exhausted his administrative remedies as provided by the Equal Employment Opportunity Commission.

Petitioner's cause of action moved towards a disposition of trial before a jury in the normal judicial process. However, on January 4, 1983, the Trial Court entered an Order removing the case from the March 21, 1983, jury trial docket and reset the case to the April 25, 1983, jury trial docket because the Court had been advised and Petitioner's Counsel was in agreement, that Respondent's Counsel should have additional time because of the impending birth to Counsel for Respondent.

For purposes of this Petition, the relevant procedural background commences when the Court entered the January 4, 1983, Order. On January 28, 1983, the Defendant filed its Motion For Summary Judgment with

supporting Affidavit. On February 9, 1983, Plaintiff filed his Response to Defendant's Motion For Summary Judgment and supplemented the Response in April. On March 10, 1983, Defendant filed a Memorandum in reply to Plaintiff's Response to Motion For Summary Judgment and on April 18, 1983, by letter, Defendant supplemented its Response to the Motions that were pending.

On April 21, 1983, the Trial Court entered an Order granting summary judgment and entered a judgment that the action be dismissed on the merits. At the time that the Court entered its April 21, 1983, Order because of the extension of the trial date due to the birth of a child to Respondent's Counsel, depositions had not been completed and transcribed and the completed depositions were filed with the Trial Court on April 29, 1983. Subsequent to the filing of those depositions, on May 17, 1983, the Petitioner filed his Motion to Urge Reconsideration of the Granting of the Motion For Summary Judgment and filed with the Trial Court an Affidavit of the Petitioner and incorporated into the Affidavit and the Motion the evaluations of the Petitioner by the Respondent which had been considered as part of the subject matter of the lengthy depositions taken in the case.

Petitioner's Motion For Reconsideration was lengthy and comprehensive consisting of eighteen pages with additional exhibits and an additional Affidavit of the Petitioner. At the time that the Motion to Urge Reconsideration was filed, Petitioner still was within the thirty-day period for filing his Notice of Appeal.

The Trial Court, after having considered Petitioner's Motion to Urge Reconsideration of the Order Granting Summary Judgment, entered an Order on June 8, 1983, wherein the Court tracked the background of this litigation and considered the Motion to Reconsider in depth. The Trial Court specifically indicated that it

would not consider the materials that were not made available previously to the Trial Court which had been submitted with the Petitioner's Motion to Reconsider. Likewise, the Trial Court did not consider Petitioner's cost effective argument, although said argument was implicit within the pleadings and the deposition testimony. However, the Trial Court did review the depositions filed by the parties on April 29, 1983, which was new evidence that the *Trial Court had not considered prior to granting* the Motion For Summary Judgment by its Order of April 21, 1983.

On July 6, 1983, within thrity days of the June 8, 1983, Order of the Trial Court, the Petitioner filed his Notice of Appeal advising the Trial Court that he was appealing the granting of Summary Judgment of April 21, 1983, and the June 8, 1983, Order of the Court which expanded and clarified the April 21, 1983, Summary Judgment Order.

The Respondent filed a Motion to Dismiss the Appeal and subsequent to the Motion to Dismiss on August 18, 1983, the Fifth Circuit Court of Appeal dismissed Petitioner's Appeal. (Appendix A).

Petitioner filed a Motion to Vacate the Order Dismissing the Appeal, a Motion to Reinstate the Appeal, and a Motion For Rehearing with the Fifth Circuit Court of Appeals, and the Respondent filed an appropriate response. On September 23, 1983, the Fifth Circuit Court of Appeals, after reconsidering Petitioner's Motion For Reconsideration, denied Petitioner's Motions and affirmed the dismissal of Petitioner's Appeal. (Appendix B).

REASONS FOR GRANTING THE WRIT

A. THE INSTANT CAUSE FITS SQUARELY WITHIN THE LETTER AND SPIRIT OF *HARRIS TRUCK LINES, INC. V. CHERRY MEAT PACKERS, INC.* 83 S.Ct. 283, 371 U.S. 215, 9 L.Ed.2d 261 (1962), *THOMPSON V. IMMIGRATION & NATURALIZATION SERVICE*, 84 S.Ct. 397, 375 U.S. 384, 11 L.Ed.2d 404 (1964), AND *PIERRE V. JORDAN*, 333 F.2d 951, (9th Cir. 1964), Cert. den. S.Ct. 664, 379 U.S. 974, 13 L.Ed.2d 565

The principle of unique circumstances in connection with Appeal time was first initiated by this Court in the case of *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.* 83 S.Ct. 283, 371 U.S. 215, 9 L.Ed.2d 261 (1962). The *Harris* principle was extended by *Thompson v. Immigration & Naturalization Service*, 84 S.Ct. 397, 375 U.S. 384, 11 L.Ed.2d 404 (1964).

The instant case fits squarely within the letter and spirit of *Harris* and *Thompson*. Here as there, Petitioner did an act, which, if properly done, postponed the deadline for the filing of his Appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the Petitioner relied on the conduct of the District Court and filed the Appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the Appeal.

In the instant case, as in *Harris* and *Thompson*, as well as *Pierre v. Jordan*, 333 F.2d 951, (9th Cir. 1964), Cert. den. 85 S.Ct. 664, 379 U.S. 974, 13 L.Ed.2d 565, the Petitioner's Motion was not timely but no objection was raised as to the timeliness of the Motions and the Court considered the Motions and entered a subsequent Order further explaining the actions of the Court. In the instant case the Trial Court treated Petitioner's Motion to Reconsider as a Motion Under Rule 59(e) and did not consider timeliness to be an

impediment to the Court's ability to seriously consider Petitioner's Motion. In this situation it is not unreasonable for the Petitioner to have concluded that the Motion was regarded as timely and that the Motion terminated the running of the Appeal time. The facts of the instant case clearly create unique circumstances as governed by *Harris*, *Thompson*, and *Pierre*.

It is clear that if Petitioner's post-trial Motions were timely then Petitioner's Appeal was timely.

Although the Trial Court did not make an explicit statement in open court, or respond to Petitioner or Respondent's Counsel in writing, Petitioner should have had the right to rely on the fact that the Trial Court entertained and seriously considered the Motion to Urge Reconsideration of the Granting of Summary Judgment, particularly in light of the fact that the Trial Court considered the deposition testimony that was not before the Court prior to the entering of the April 21, 1983, granting of Summary Judgment. This is particularly important in view of the fact that between entering the April 21, 1983, Order and the June 8, 1983, Order reaffirming the April 21, 1983, Order, the Trial Court reviewed ten depositions, that is, over 625 pages of new testimony, taken from Respondent's employees covering the issue of the case. The Trial Court, in its Order of June 8, 1983, indicated that it had considered the additional evidence and arguments of Petitioner and that it was reaffirming its Order of April 21, 1983. In effect, the Trial Court was relating back through the June 8, 1983, Order to the initial April 21, 1983, Order and Judgment.

It is clear that had the Trial Court advised the Petitioner that the Trial Court was not going to consider Petitioner's Motion to Urge Reconsideration of the Motion For Summary Judgment as a Motion For New Trial Under Rule 59(e), the Petitioner still was within the thirty-day time limit for filing his Notice of Appeal.

Petitioner accepts the fact that cases in litigation need finality, however, in a situation such as in the instant case where the discovery process is interrupted for valid reasons and where the Trial Court rules on a pending Motion For Summary Judgment with only part of the evidence submitted, and where the Trial Court considers additional evidence relating to the post-judgment motions and the Petitioner *relies in a reasonable manner upon the actions and conduct of the Trial Court*, such actions constitute unique circumstances and the allowance of the Appeal is just and equitable.

B. THE FIFTH CIRCUIT COURT OF APPEAL'S POSITION IS IN JUXTAPOSITION TO THE NINTH CIRCUIT COURT OF APPEAL'S POSITION AS SET FORTH IN *PIERRE V. JORDAN*, 333 F.2d 951 (9th Cir. 1964), *Cert. den.* 85 S.Ct. 664, 379 U.S. 974, 13 L.Ed.2d 565, AND THE *PIERRE* POSITION IS THE REASONABLE POSITION.

The Fifth Circuit, in dismissing Petitioner's Appeal, stated that a District Court's mere willingness to entertain a tardy Motion For a New Trial does not relieve the prospective Appellant from responsibility for the filing of a timely Notice of Appeal, relying on *Alvestad v. Monsanto Co.*, 671 F.2d 908 (5th Cir. 1982). This position is in juxtaposition to the Ninth Circuit's position as set forth in *Pierre v. Jordan, supra*, wherein the Ninth Circuit ruled that the Plaintiff reasonably could have concluded that the Motion that was entertained by the Court and decided on its merit was regarded as timely, and the existence of unique circumstances require that the untimely Motions be regarded as having terminated the running of Appeal time and thus, the Appellant was permitted to file an appeal.

When employed in the context of an untimely appeal, the unique circumstances concept is based on a theory similar to estoppel. This Court seems to have concluded that a party ought not be denied an opportunity to appeal because of his failure to file a timely appeal when that failure resulted from reliance on action taken by the District Court that generated a reasonable belief that an appeal could be initiated at a later date. When viewed from this perspective, modification of the rule that time for appeal is not extended by an untimely new trial motion under Rule 59 undoubtedly serves the interests of justice. The unique circumstances departure from the literal language of Rule 6(b), Rule 59, and former Rule 73 is entirely consistent with the mandate in Rule 1 calling for the "just . . . determination of every action." Moreover, resort to the unique circumstances principle to permit an otherwise prohibited extension of appeal time ensures that Petitioner's right to seek review will be protected at the expense of only a modest incursion on the rules relating to the finality of judgments.[1]

C. IN AN AGE DISCRIMINATION IN EMPLOYMENT ACT CASE LITIGANTS SHOULD HAVE A FULL HEARING AND SUMMARY JUDGMENTS ARE INAPPROPRIATE.

In the April 21, 1983, Order Granting Summary Judgment (Appendix C) the Trial Court relied on First Circuit, Fourth Circuit, Seventh Circuit and Ninth Circuit opinions, rather than on controlling Fifth Circuit law.

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[1] See: Comment, Ad Hoc Relief for Untimely Appeals, 1965, 65 Col. L. Rev. 97; recent developments, prejudicial reliance upon a trial court's ruling may result in suspension of Federal rules on timeliness of appeals — *Thompson v. Immigration & Naturalization Ser.; Wolf Sohn v. Hankin*, 1965, 63 Mich. L. Rev. 1288. In addition, the similarity of the provisions of the rules governing time for taking an appeal and the enlargement provisions of the appellate Rules essentially are identical to this correspondence rule formerly found in the Federal Rules of Civil Procedure. Compare Fed. R. App. P. 26 and Fed. R. Civ. P. 6 and compare Fed. R. App. P. 4 and former Fed. R. Civ. P. 73.

The Trial Court in its June 8, 1983, Order (Appendix D) recognized the caution which must be exercised in granting summary judgment in employment discrimination cases after having reviewed Petitioner's Motion to Urge Reconsideration of Granting of Defendant's Motion For Summary Judgment wherein it was called to the Trial Court's attention the Supreme Court's decision of *United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478 (1983) and controlling Fifth Circuit law.

A review of the pleadings, depositions, and exhibits and affidavits in this case clearly indicate that Petitioner made out a prima facie case of age discrimination and satisfied the requirements as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1870, 36 L.Ed.2d 668 (1973) as clarified in *United States Postal Service Board of Governors v. Aikens, supra*. The Petitioner pointed out to the Trial Court that once a prima facie case was established the Respondent in articulating a nondiscriminatory legitimate business reason for the termination moved the "factual inquiry" to a new level of specificity. This factural inquiry is what the jury in the instant case was to determine.

The Trial Court relied in its Order Granting Summary Judgment on the Ninth Circuit decision of *Douglas v. Anderson*, 656, F.2d at 533 n.5, the First Circuit decision of *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the Fourth Circuit decision of *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982) and the Seventh Circuit decision of *Kephart v. Institute of Gas Technology*, 620 F.2d 1217 (7th Cir. 1980), *Cert. den.* 450 U.S. 959 (1980). Petitioner pointed out to the Trial Court that in *Douglas v. Anderson* it was a directed verdict after the Plaintiff had had a full opportunity to present his case. In *Lovelace v. Sherwin-Wil-*

liams Co. it was a judgment notwithstanding the verdict after the Plaintiff had convinced the jury that age was the determining factor. In *Loeb v. Textron Inc.* the Plaintiff was permitted to have a jury trial. In addition, the Plaintiff called to the attention of the Trial Court the Fifth Circuit decisions which are controlling in this case.

In *Equal Employment Opportunity Commission v. Southwest Texas Methodist Hospital*, 606 F.2d 63 (5th Cir. 1979), the Court stated:

> "[w]hen dealing with employment discrimination cases, which usually necessarily involve examining motive and intent . . ., granting of summary judgment is especially questionable."

The Trial Court in its April 21, 1983, Order indicated that there were no conflicting indications of motive and intent, although the record clearly establishes that there were such conflicts. Petitioner also called the Court's attention to *Hayden v. First National Bank of Mt. Pleasant, Texas*, 595 F.2d 994 (5th Cir. 1979), where the Court set forth the rule of law governing the Fifth Circuit when it stated:

> "We turn next to the teachings of *Gross v. Southern Railroad, Co.*, 5 Cir. 1969, 414 F.2d 292:
>
> It is also well settled that in considering a motion for summary judgment, the court has no duty or function to try or decide factual issues. Its only duty is to determine whether or not there is an issue of fact to be tried. *Chappel v. Goltsman*, 5 Cir. 1950, 186 F.2d 215, 218; and *Slagle v. United States*, 5 Cir. 1956, 228 F.2d 673, 678. Furthermore, all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct.

993, 8 L.Ed. 176 (1962). Also, all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment. *Hawkins v. Frick-Reid Supply Corp.*, 5 Cir. 1946, 154 F.2d 88, 89-90. In passing on such a motion, the court should not assess the probative value of any of the evidence. Id. at 297. See also, *Cook v. Bristol Steel and Iron Works*, 5 Cir. 1978, 582 F.2d 22, 23; *Northwest Power Products, Inc. v. Omark Industries*, 5 Cir. 1978, 576 F.2d 83, 85 rehearing denied, 579 F.2d 643; *Southern Distributing Co., Inc. v. Southdown, Inc.*, 5 Cir. 1978, 574 F.2d 824, 826.

Additionally, we have noted that "[i]n making its determination, the court may not weigh conflicting affidavits to resolve disputed fact issues." *Farbwerke Hoescht A. G. v. M/V "Don Nicky"*, 5 Cir. 1979, 589 F.2d 795, 798. One who moves for summary judgment is not entitled to a judgment "merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial." 10 *Wright and Miller, Federal Practice and Procedure* Subsection 2725.

When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party,[1] granting of summary judgment is especially questionable. In these cases "summary judgment should be used cautiously and all procedural requirements given strict adherence . . . *Lavin v. Illinois High School Association*, 7 Cir. 1975, 527n F.2d 58, 61. "[O]rdinarily summary disposition of Title VII cases is not favored, especially on a 'potentially inadequate factual presentation'." *Logan v. General Fireproofing Co.*, 4 Cir. 1971, 521 F.2d 881, 883, quoting *Williams v. Howard Johnson's Inc. of Washington*, 4 Cir. 1963, 323 F.2d 102, 105."

Likewise, the Petitioner called the Court's attention to *McCorstin v. United States Steel Corporation*, 621 F.2d 749, (5th Cir. 1980), wherein the Fifth Circuit recognizes that:

> "There must be conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weight conflicting evidence and inferences, and determine the credibility of witnesses" at 752.

Also where the Court recognizes that discrimination is often times now subtle and not easily detected. The Court, in recognizing this fact of our business world states:

> "Discrimination, unfortunately, exists in forms as myriad as the creative perverseness of human beings can provide."

The Court warns against strict reliance of the *McDonnell Douglas* application when the Court states:

> "A mechanistic application of the *McDonnell*, prima facie test is especially dangerous in the context of age discrimination. Seldom will a sixty-year-old be replaced by a person in the twenties. Rather the sixty-year-old will be replaced by a fifty-five-year-old, who, in turn, is succeeded by a fifty-five-year-old, who, in turn, is succeeded by a person in the forties, who also will be replaced by a younger person. Eventually, a person outside the protected class will be elevated but rarely to the position of the one fired. This is especially true in management and technical fields where knowledge and experience, the product of years, are necessary prerequisites to appointment of persons on high rungs of the corporate ladder."

It is Petitioner's position that this subtle form of discrimination was practiced against him because no where does the Respondent define *insubordinatoin* and that the reasons for his termination are very much in conflict by the witnesses for the Respondent as is seen by their depositions which were all filed with the Trial Court.

Petitioner also called the Court's attention to *Haydon v. Rand Corporation*, 605 F.2d 453 (9th Cir. 1979), a situation which is similar to the Petitioner's situation and where the Court states as follows:

> "[4] As a long-time employee, Haydon earned a high salary and therefore was employed at a relatively high cost to Rand. Haydon argues that there is a direct relationship between his age and the cost of his employment, and that Rand improperly considered his employment costs in selecting him for discharge. The record on summary judgment does not clearly disclose the extent to which the cost factor influenced Rand's decision to discharge Haydon. Accordingly, we decline the invitation to discuss the circumstances in which an employer may base employment decisions on relative costs of employment. It may be unnecessary to reach that difficult issue if the evidence presented at trial fails to support Haydon's allegations. In any event, it would be inappropriate to resolve the issue in the abstract and in general terms; only after the development of a full record can the question be presented with sufficient clarity and in sufficiently narrow terms to permit meaningful appellate decision making."

The Petitioner also called the Court's attention to the 1981 Fifth Circuit opinion of *McCuen v. Home Insurance Company*, 633 F.2d 1150 (1981), wherein the Court recognized that in a reduction of force situation

it would appear to be a violation of the Age Discrimination in Employment Act to let age be the determining factor in deciding who will go. The Court reversed and remanded the granting of summary judgment because the district court had relied on *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977) and expressed the opinion that *Price v. Maryland Casualty Co.* followed a "full trial".

Finally, Petitioner called the Court's attention to the Fourth Circuit opinion of *Cline v. Roadway Express, Inc.*, 689 F.2d 481 (4th Cir. 1982), which contains a well-reasoned analysis of the requirements the Petitioner must meet, that the Respondent must meet and the proof allowed in an ADEA case.

CONCLUSION

Petitioner moves the Court to grant the Writ of Certiorari, vacate the Judgment of the Court of Appeals, and remand the case to the Court of Appeals so that Petitioner's Appeal may be heard on the merits.

Respectfully submitted,

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(214) 565-9500

Frank P. Hernandez
State Bar No. 09516000
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Petition For Writ of Certiorari for Petitioner has this day been mailed to the following Attorneys of Record in this case by Certified Mail, Return Receipt Requested:

Charles A. Gall
Harry A. Light
Jenkens & Gilchrist
2200 InterFirst One
Dallas, Texas 75202

Signed this ____ day of December, 1983.

Frank P. Hernandez

Lynn Lawther, Jr.)
Petitioner)
) NO. _____
V.)
)
Jacobs Manufacturing Company)
Respondent

AFFIDAVIT OF COUNSEL AS TO MAILING PETITION OF WRIT OF CERTIORARI

I, Frank P. Hernandez, Counsel for Lynn Lawther, Jr., Petitioner, swear that the foregoing Petition was deposited in the United States mail with the proper postage, prepaid, on December ____, 1983.

_____
Frank P. Hernandez

STATE OF TEXAS)
)
COUNTY OF DALLAS)

SWORN TO AND SUBSCRIBED before me, a notary public, by the said FRANK P. HERNANDEZ, on this the ____ day of December, 1983, to certify which witness my hand and seal.

_____
Notary Public in and for
The State of Texas

My Commission Expires: 9-26-87

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 83-1473

LYNN LAWTHER, JR.,

Plaintiff-Appellant,

versus

JACOBS MANUFACTURING CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before RUBIN, GARWOOD and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED That the appellee's motion to dismiss the appeal as untimely is GRANTED and the appeal is hereby DISMISSED.

On April 21, 1983, the district court granted Jacob Manufacturing's motion for summary judgment and entered judgment dismissing Lawther's age discrimination suit. On May 17, 1983, twenty-six days after judgment, Lawther filed a motion to urge reconsideration of granting of defendant's motion for summary judgment ("motion for reconsideration").

On June 8, 1983, the district court, correctly treating

Lawther's motion for reconsideration as having been made under Rule 59(e) of Fed. R. Civ. P., denied the motion and affirmed its order of April 21, 1983, granting summary judgment for Jacobs. On July 6, 1983, Lawther filed his Notice of Appeal, seventy-six days after the district court entered judgment in favor of Jacobs.

Lawther's Rule 59(e) motion was not filed, as required, within ten days after the entry of judgment; the motion was therefore untimely and did not toll the time limit for filing the notice of appeal. Lawther's filing of the notice of appeal within thirty days of the district court's denial of his motion for reconsideration, therefore, cannot give this court jurisdiction of his appeal. *See* Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980).

The district court's mere willingness to entertain a tardy motion for a new trial does not relieve the prospective appellant from responsibility for the filing of a timely notice of appeal. Alvestad v. Monsanto Co., 671 F.2d 908 (5th Cir. 1982).

The appeal therefore is DISMISSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-1473

LYNN LAWTHER, JR.,

Plaintiff-Appellant,

versus

JACOBS MANUFACTURING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before RUBIN, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

By previous order, the panel dismissed Lawther's appeal because he had failed to file a timely notice of appeal. Lawther has now filed a Motion for Reconsideration of that order. He contends that there are "unique circumstances" which excuse his late filing. This court has said if an appellant can show that it has been misled by the words or conduct of the trial court into believing that the filing of an appeal within the thirty-day deadline was unnecessary, it will excuse the late filing. In this case, there was no showing that the trial court did anything to lead Lawther into believing that a timely filing was unnecessary.

Contrary to Lawther's argument, the "unique cir-

cumstances" doctrine cannot be used to toll the ten-day requirement for filing a motion for reconsideration under Rule 59(e). Therefore, his argument that the "unique circumstances" doctrine can be used to make his late-filed motion for reconsideration timely and thus also make his notice of appeal timely, also fails.

Finally, Lawther contends that the district judge's consideration of his tardy Motion for Reconsideration operates as a *de facto* grant of an extension of time for filing an appeal. As the appellant points out in opposing Lawther's present motion, his position ignores the Federal Rules of Appellate Procedure and their jurisdictional mandates, as well as previous decisions of this court.

For these reasons appellant's motion for reconsideration of the Court's order of August 18, 1983, dismissing the appeal is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

LYNN LAWTHER, JR., *Plaintiff*	§ § §	CIVIL ACTION No. CA-3-82-1196D
v.	§ §	
JACOBS MANUFACTURING COMPANY, *Defendant*	§ §	

ORDER GRANTING SUMMARY JUDGMENT

Came on for consideration before the Court Defendant Jacobs Manufacturing Company's (Jacobs) Motion for Summary Judgment. Jacobs contends that Plaintiff Lynn Lawther, Jr.'s claim under the Age Discrimination Act, 29 U.S.C. §621 *et seq.*, fails to raise a genuine issue of material fact and that it is entitled to judgment as a matter of law. Having considered the parties' briefs and summary judgment proof in light of the relevant law, the Court is of the opinion that Jacobs' motion should be granted.

I. Factual Background

Lawther worked for Jacobs from August 1965 until his termination in October 1981. At the time of his termination Lawther, a 47-year-old male, served as Southern Regional Manager of the Vehicle Equipment Division of Jacobs. In August 1981 Jacobs effected a reduction in its work force in response to declining customer demand for its products. As part of that reduction in force, management decided to terminate

Wilbur Wood, a twenty-eight-year-old sales representative who was under Lawther's direction.

Upon being informed of management's decision Lawther vehemently opposedthe policy and refused to follow instructions to terminate Wood. Despite being counseled as to the seriousness of his opposition to Jacobs' policy decision, Jacobs persisted in his resistance. After a short period of suspension, Jacobs made the decision to terminate Lawther. At no time during the process did Lawther raise the factor of age as a consideration in Jacobs' actions. In his deposition Lawther testified that he had never witnessed evidence of age discrimination during his tenure as a Jacobs employee. (Lawther Deposition 22-24).

The events and discussions leading up to Lawther's termination are well documented. Lawther recognized that he was "sticking his neck out" and that he and the company "were forced into corners in opposition of the issue." (Lawther Deposition 77). Lawther testified that he realized that it was unlikely that any resolution would be reached which would allow him to continue at Jacobs. (Lawther Deposition 77). Lawther stated that he made a commitment to do everything possible to convince management that its decision to terminate Wood was illogical, and that he was willing to put his "body on the line" in defense of his own position. (Lawther Deposition 93; Exh. 3). In answer to the question of when he first decided that he was terminated because of his age, Lawther responded, "I don't know what has happened. I don't know what their logic is. I don't know what their reaction is. I continue to be somewhat dumbfounded." (Lawther Deposition 98). While Lawther admits that his disagreement with company policy led chronologically to his termination, he expressed confusion as to why the company's response had been "vindictive" and of such a high level of intensity. (Lawther Deposi-

tion 100-101). When questioned as to the basis of his age discrimination claim, Lawther stated, "Well, it was just one of those factors that could have been," and finally, "I still don't really know [why], no. I can't prove anything." (Lawther Deposition 102).

II. Legal Analysis

In support of a prima facie case under the Age Discrimination in Employment Act Lawther alleges that: (1) he was in the age group protected by the Act, (2) he was terminated, (3) he was qualified for the position which he occupied, and (4) he was replaced by an *individual outside the protected age group. See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). While denying that Lawther has established his prima facie case, Jacobs has stated that Lawther was dismissed as a result of his refusal to carry out company directives and his unalterable opposition to certain management decisions.[1/]

Lawther had not responded with any evidence of probative force, beyond personal speculation, that this reasoning was pretextual.

In response to Jacobs' motion Lawther makes a generalized statement that the evidence establishes a "serious fact issue." The only specific evidence alluded to consists of portions of Russell Hedrick's deposition testimony in which he stated that in his position as Industrial Relations Director, he took a "harder look" at the Lawther case because of his age. The full context of Hedrick's testimony demonstrates beyond dispute that Hedrick denies that age was a motivating factor and that he attended to Lawther's age in order

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[1/] The evidence indicates that Lawther may have eventually agreed to inform Wood of the company's decision when it was clear that someone else would assume responsibility for talking with him, but even at the juncture Lawther indicated that he would not change his opposition to the company's policy. The Court is not concerned with the wisdom of Jacobs' decision that Lawther's actions warranted dismissal, so long as the employer's claimed concern is not a pretext for age discrimination. Douglas v. Anderson, 656 F.2d 528, 533 n.5 (9th Cir. 1981).

to ensure compliance with the Age Discrimination Act. (Hedrick Deposition 20, 29).

As the Ninth Circuit noted in *Douglas v. Anderson, supra*, the issue of satisfactory job performance "permeates the prima facie case as well as the rebuttal and pretext issues." 656 F.2d at 533 n.5. In *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979), the court stated that the plaintiff must prove that "he was performing his job at a level that met his employer's legitimate expectations." In addition, some courts have indicated that a plaintiff must prove that satisfactory performance "continued to a time reasonably close to the time of the challenged employer action." *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 244 (4th Cir. 1982).

Jacobs admits that "historically" Lawther has been a good employee. Still, as the Court noted in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1980), "If [plaintiff] was not doing what his employer wanted him to do, he was not doing his job." Even if Lawther had successfully raised a fact issue on the prima facie level, his claim would be fated by Jacob's strong evidence of lack of pretext and by his own inability to respond with any probative evidence beyond mere speculation. There are no conflicting indications of motive and intent.

Under the circumstances, summary judgment in favor of Jacobs is appropriate. In light of the Court's ruling, there is no need to address any remaining pending motions.

It is so ORDERED.

Dated this 21 day of April, 1983.

R. M. HILL

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

LYNN LAWTHER, JR., *Plaintiff*	§ § §	CIVIL ACTION No. CA-3-82-1196D
v.	§ §	
JACOBS MANUFACTURING COMPANY, *Defendant*	§ §	

JUDGMENT

Came on for consideration defendant's motion for summary judgment and the Court having sustained defendant's motion,

It is ORDERED and ADJUDGED that plaintiff, Lynn Lawther, Jr., take nothing against the defendant, Jacobs Manufacturing Company, that the action be dismissed on the merits and that defendant recover its costs of action.

Dated at Dallas, Texas, this 21 day of April, 1983.

R. M. HILL

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

LYNN LAWTHER, JR., *Plaintiff*	§	CIVIL ACTION No. CA-3-82-1196D
v.	§	
JACOBS MANUFACTURING COMPANY, *Defendant*	§	

ORDER

Came on for consideration before the Court Plaintiff Lynn Lawther, Jr.'s (Lawther) Motion to Urge Reconsideration of Granting of Defendant's Motion for Summary Judgment. The Court has considered the motion as having been made pursuant to Fed. R. Civ. P. 59(e). Having reviewed the parties' briefs and the record in this case, the Court is of the opinion that the motion should be denied.

Background

By Order dated January 4, 1983, this action was set for trial on the April 25 jury trial docket. On January 28 Defendant Jacobs Manufacturing Company (Jacobs) filed a motion for summary judgment. Lawther's response, filed February 9, specified no disputed factual issues, but indicated that discovery was ongoing in the case that he considered the motion premature. Having heard nothing further from Lawther, the Court advised him by Order dated April 8 that any supplementary response to the motion for summary judgment should be filed within 5 days. At this point plaintiff's

counsel communicated to the Court that he thought a response on behalf of his client would be a "waste of paper" unless the Court was seriously considering granting summary judgment.

On April 14 Lawther filed a supplementary response. Lawther indicated that additional depositions had been completed and would be ready for filing on April 18. Rather than requesting the Court to defer ruling until the depositions were filed, Lawther submitted his own affidavit relating the substance of the deposition testimony material to his response. Lawther's only specific reference to a potentially disputed issue concerned R. C. Hedrick's deposition testimony. The Court waited until it had received and reviewed the full transcript of Hedrick's deposition before making its ruling, but found ultimately that Lawther had mischaracterized the referenced portions of Hedrick's deposition.

On April 21, 1983, the Court granted summary judgment for Jacobs, concluding that there were no facts from which an inference of age discrimination could be drawn. The Court reviewed all of the documentation on file, along with Lawther's representations as to deposition testimony, and found that there was no dispute as to why Lawther had been terminated. Lawther bases his suspicion of age discrimination on the level of "hostility" he claims was generated by his open opposition to company policy. The Court accepted Lawther's perception of hostility, but found no showing that such hostility was based on age. See *Aquamina v. Eastern Airlines, Inc.*, 644 F.2d 507 n.4 (5th Cir. 1981) (upholding grant of summary judgment on discriminatory discharge claims).

Motion to Reconsider

Lawther has now come forward with a request for the Court to reconsider its grant of summary judgment. Along with the motion, Lawther has filed another affidavit of his own and numerous exhibits. Rule 56 provides for the serving of opposing affidavits prior to the date set for hearing the motion. Local Rule 5.2(a) requires identification of disputed and material facts in response to a motion for summary judgment. This Court is not required at this point to examine additional affidavits or consider newly identified points of alleged contention. *See Jones v. Menard, 559 F.2d 1282, 1285 n.5 (5th Cir. 1977); Clarke v. Montgomery Ward & Co.*, 298 F.2d 346, 349 (4th Cir. 1962).

In *DeLong Corp. v. Raymond Int'l, Inc.*, 622 F.2d 1135 (3rd Cir. 1980), the district court refused to consider new affidavits and exhibits on a motion to reconsider summary judgment because there was no showing that such materials were unavailable prior to the original ruling. The Third Circuit affirmed the district court's decision. 622 F.2d 1140 & n.5. Those materials which were not made available previously and which have now been submitted with Lawther's motion to reconsider will not be considered by this Court. Similarly, the arguments based on these new materials (e.g. claim that Lawther's discharge was cost effective) will not be taken into account.

The Court has reviewed the depositions filed on April 29, 1983. Still, the conclusion is inescapable that there is no circumstantial evidence from which an inference of discrimination can be drawn. The failure of Peter Brinkerhoff and Donald Sandstrom to agree on whether a particular meeting took place on a Wednesday morning in August 1981 does not raise a material issue of pretext. (Brinkerhoff Depos. 14) (Sandstrom Depos. 50). The careless wording of an ir-

relevant detail in George Fleming's affidavit is neither material nor disputed. (Fleming Depos. 10-11). The exact date of Lawther's termination is not a controverted fact capable of preventing summary judgment.

With full recognition of the caution which must be exercised in considering a grant of summary judgment in employment discrimination cases, the Court hereby denies Lawther's motion to reconsider and reaffirms its Order of April 21.

It is so ORDERED.

Dated this 8 day of June, 1983.

R. M. HILL

United States District Judge

Office - Supreme Court, U.S.
FILED
JAN 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1060

In The

Supreme Court of the United States

OCTOBER TERM, 1983

LYNN LAWTHER, JR.,

Petitioner,

v.

JACOBS MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM D. SIMS
(Counsel of Record)
CHARLES A. GALL
HARRY A. LIGHT

JENKENS & GILCHRIST
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QUESTIONS PRESENTED

1

WHETHER A DISTRICT COURT'S CONSIDERATION AND DENIAL OF AN UNTIMELY POST TRIAL MOTION CONSTITUTES "UNIQUE CIRCUMSTANCES" JUSTIFYING AN EXTENSION OF THE TIME FOR FILING A NOTICE OF APPEAL UNDER FED. R. APP. P. 4(a) WHERE THE DISTRICT COURT DOES NOTHING DURING THE PERIOD FOR FILING A TIMELY NOTICE OF APPEAL INDICATING THAT THE UNTIMELY POST TRIAL MOTION IS BEING CONSIDERED OR THAT THE PERIOD FOR FILING A NOTICE OF APPEAL HAS BEEN EFFECTIVELY TOLLED BY THE FILING OF THE UNTIMELY POST TRIAL MOTION?

2

WHETHER THE FILING OF AN UNTIMELY MOTION FOR REHEARING IN THE COURT OF APPEALS TOLLS THE TIME FOR PETITIONING FOR A WRIT OF CERTIORARI UNDER 28 U.S.C. § 2101(c)?

PARTIES

Lynn Lawther, Jr.

Jacobs Manufacturing Company

Chicago Pneumatic Tool Company (parent company)

Consolidated Pneumatic Tool, Ltd. (India) (subsidiary)

Toku Hambai, K.K. (Japan) (subsidiary)

Chicago Pneumatic LatinoAmericana, S.A. (Mexico) (subsidiary)

Revathi-CP Equipment, Ltd. (India) (subsidiary)

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TABLE OF AUTHORITIES

In The

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1060

LYNN LAWTHER, JR.,

Petitioner,

v.

JACOBS MANUFACTURING COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit granting Respondent's Motion to Dismiss Petitioner's untimely appeal from the judgment of the district court was entered on August 18, 1983. On September 6, 1983, nineteen (19) days later, Petitioner filed a Motion to Vacate Order Dismissing Appeal, Motion to Reinstate Appeal and Motion for Rehearing which was denied by the same court on September 23, 1983. A petition for writ of certiorari was filed by Petitioner in this Court on December 20, 1983.

APPLICABLE STATUTORY PROVISIONS, SUPREME COURT RULES, FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF APPELLATE PROCEDURE

Statutory Provisions

28 U.S.C. § 2101(c) — Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Supreme Court Rules

Rule 20(4) — The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

Federal Rules of Civil Procedure

Rule 59(e) — Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rules of Appellate Procedure

Rule 4(a)(1) — In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be

filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

Rule 4(a)(4) — If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

RULE 40(a) — Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

STATEMENT

Respondent agrees generally with Petitioner's recitation of the procedural background of this case; however, Petitioner's description of the events surrounding the district court's ruling on the Motion for Summary Judgment and the Motion to Urge Reconsideration of Granting of Defendant's Motion for Summary Judgment ("Motion for Reconsideration") is somewhat misleading. *See generally* Order Denying Motion for Reconsideration (Appendix D to Petition for Writ of Certiorari).

In particular, Petitioner omits any reference to Judge Hill's April 8, 1983 order directing him to file a supplementary response to Respondent's Motion for Summary Judgment, since his previous response had not addressed the merits of the Motion. (Appendix A). After first indicating to the court that a response would be a "waste of paper", Petitioner submitted a lengthy response detailing the deposition testimony of Petitioner and of R. C. Hedrick, an employee of Respondent, upon which Petitioner relied to create an issue of fact. *See* Order Denying Motion for Reconsideration (Appendix D to Petition for Writ of Certiorari). As a result of this, the trial court delayed ruling upon the Motion for Summary Judgment until it had received and reviewed the full transcript of Mr. Hedrick's recently completed deposition. Thus, at the time the trial court granted Respondent's Motion for Summary Judgment it was in possession of all the material which Petitioner relied upon to create an issue of fact.

After the district court entered summary judgment in favor of Respondent, Petitioner filed a Motion for Reconsideration on May 17, 1983, only four days before his time for filing a notice of appeal expired pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure. It is undisputed that prior to the time Petitioner's time for appeal expired,

the trial court took no action with respect to the Motion for Reconsideration, and gave no indication to the Petitioner that his time for appeal was extended. Thus, at the time Petitioner's time for appeal expired he had absolutely no reason to believe his time for appeal had been extended — the only thing which had occurred was the *untimely* filing of a post trial motion under Rule 59 of the Federal Rules of Civil Procedure.

Petitioner also fails to disclose that his Motion to Vacate the Order Dismissing the Appeal, Motion to Reinstate Appeal and Motion for Rehearing was not filed with the Fifth Circuit Court of Appeals until September 6, 1983, nineteen (19) days after the entry of the order dismissing his appeal.

REASONS FOR DENYING THE WRIT

There were no "unique circumstances" in this case which relieved Petitioner from his obligation to timely file a notice of appeal and thus the cases relied on by Petitioner are inapplicable to the case at bar.

Petitioner contends that a writ of certiorari is warranted in this case because of the purported improper refusal of the Fifth Circuit Court of Appeals to apply the doctrine of "unique circumstances" to salvage his untimely appeal from the judgment entered by the district court in favor of Respondent. In support of his position, Petitioner relies exclusively on this Court's holdings in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) ("*Harris*") and *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) ("*Thompson*"), as well as the Ninth Circuit Court of Appeals' decision in *Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965) ("*Pierre*"). All three of these cases involved easily

distinguishable factual settings and are thus clearly inapplicable to the case at bar.

Respondent agrees with Petitioner that the cases cited above establish a very limited doctrine which has been selectively invoked in appropriate circumstances to relieve a prospective appellant of the consequences of filing an untimely notice of appeal. Petitioner, however, ignores the fact that this doctrine was considered and rejected by the Court of Appeals because the vital prerequisite for reliance on the "unique circumstances" doctrine — conduct by the trial court within the prescribed period for filing a notice of appeal which reasonably led the appellant to believe that the action taken by the trial court effectively tolled the time limitations for appeal — is not present in this case.

In *Harris, supra*, the Seventh Circuit Court of Appeals had dismissed an appeal because it found that the trial court's grant of a motion for extension of time to appeal based on "excusable neglect" was unwarranted and thus even though timely filed, the motion for extension of time did not toll the time for filing a notice of appeal. This Court found "unique circumstances" present since the appellant, in delaying his appeal, had relied on the trial court's order extending the time for appeal. Accordingly, this Court vacated the Circuit Court's dismissal because of the "obvious great hardship to a party who relies on the trial judge's finding of 'excusable neglect'... and then suffers a reversal of that finding..." *Id.* at 371 U.S. 217.

The "unique circumstances" doctrine was again applied in *Thompson, supra*, where this Court, in a divided opinion, held that a trial court's explicit assurance to the petitioner within the time for filing a notice of appeal that his post trial motion was timely constituted "unique circumstances"

effectively extending the running of the time for appeal. Thus, in both *Harris* and *Thompson* — the only cases from this Court upon which Petitioner relies — the prospective appellant was lulled into the false sense of security that he could delay filing his notice of appeal because of the extension of time explicitly granted by the district court. This crucial element is notably absent in the case at bar.

The only other case relied upon by Petitioner is *Pierre v. Jordan, supra,* where the Ninth Circuit Court of Appeals, in a questionable extension of the "unique circumstances" doctrine, held that the trial court's denial of an untimely post trial motion on the merits two days *before* the time for filing a notice of appeal expired justified the *pro se* party's belief that the post trial motion effectively tolled the appellate time limitations and thus refused to dismiss the appeal. The *Pierre* court recognized that had Mrs. Pierre, a layman, been informed that her post trial motion was untimely at the time the motion was denied on the merits, she still would have had two days to file her notice of appeal. In contrast, the facts of this case show that nothing done by the trial court during the thirty day period in which Petitioner was required to file his notice of appeal could have misled Petitioner.

Petitioner admits that the trial court took no action within the time for filing a notice of appeal which led him to believe that his post trial motion, filed nearly three weeks late,[1] was being considered or had any effect on the time

[1] The District Court's order granting summary judgment in favor of Respondent was entered on April 21, 1983. Under Rule 59 of the Federal Rules of Civil Procedure Petitioner had ten (10) days to serve his post trial motions. Petitioner, however, took no further action until twenty-six (26) days later when, on May 17, 1983, he filed his Motion to Urge Reconsideration of Granting of Defendant's Motion for Summary Judgment.

requirements for appeal. Thus, Petitioner's argument can only be construed to mean that the fact a court subsequently enters an order demonstrating actual consideration of an untimely post trial motion justifies the assumption on the part of the party filing such motion that the motion effectively tolled the time for filing a notice of appeal. Such a boot-strapping proposition is, at best, incredible. Under Petitioner's theory, any time a post trial motion is filed the district court should immediately determine whether the motion is timely, look to see when the time expires for appealing the judgment and insure that the moving party is informed of the untimeliness of his motion before the expiration of the time for filing a notice of appeal. It is difficult to conceive the magnitude of the burden such a procedure would place on the federal district courts.

In the absence of any misleading conduct by the trial court, Petitioner's reliance on *Harris*, *Thompson* and *Pierre* is misplaced and there is thus no basis for invoking the "unique circumstances" doctrine. Extension of the "unique circumstances" doctrine to the case at bar would not only emasculate the rules prescribing time limitations for post trial motions and appeals, but would also undermine their certainty and cause untold confusion among the lower courts and bar. *Thompson, supra,* 375 U.S. at 389-90, (Clark, J., dissenting).

There is no conflict between the Fifth Circuit Court of Appeals' position and the Ninth Circuit Court of Appeals' decision in *Pierre v. Jordan*, 331 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965).

Petitioner attempts to create a conflict where none exists. The distinction between the Fifth Circuit Court of Appeals' reliance in this case on *Alvestad v. Monsanto Co.*, 671 F.2d

908 (5th Cir. 1982) *("Alvestad")* and the Ninth Circuit Court of Appeals' decision in *Pierre, supra,* does not lie in any differing interpretations of law but rather on facts giving rise to or negating the existence of "unique circumstances."

The Fifth Circuit's position in *Alvestad* that a "district court's mere willingness to entertain a tardy motion for a new trial does not relieve a prospective appellant from responsibility for filing a timely notice [of appeal]," *Id.* at 911 n.1, is no more than proper recognition of the principle that the jurisdictional time limits set forth in FED. R. APP. 4(a)(1) cannot be directly or indirectly extended *in the absence of "unique circumstances." See Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257 (1978). In *Alvestad,* the court simply found that there were no "words or actions [by] the district court [which] clearly [misled] the aggrieved party into believing that the filing of an appeal within the thirty-day deadline was unnecessary." *Alvestad, supra,* 671 F.2d at 911. This holding is entirely consistent with *Pierre.* Moreover, the *Alvestad* decision correctly confines the "unique circumstances" doctrine to the carefully prescribed boundaries outlined by this Court in *Harris* and *Thompson, supra.*

Petitioner has failed to show that this case merits discretionary review by this Court.

The sole ground relied on by Petitioner to justify discretionary review by this Court is the purported conflict between the Fifth and Ninth Circuit Court of Appeals in applying the "unique circumstances" doctrine. As noted above, however, the alleged conflict is easily explainable by the facts presented to the respective courts for review.

Even if a strained reading of *Pierre* leads one to conclude that a conflict between the circuits might exist, the conflict

is neither so apparent nor of such a magnitude that review by this Court is warranted. Review by certiorari should only be granted

> "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeal."

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923) (emphasis added); *see also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1950).

The transparent conflict set forth by Petitioner is nothing more than a thinly veiled plea that this Court sanction his attempts to ignore the jurisdictional mandates of the Federal Rules of Civil and Appellate Procedure. The type of *ad hoc* relief requested by Petitioner does not justify taxing the time and resources of this already burdened Court.

The Petition for Writ of Certiorari was not timely filed and must, therefore, be dismissed for lack of jurisdiction.

Petitioner's disregard of the time requirements for appropriate actions by a disappointed litigant did not end with his untimely post judgment motion in the district court and tardy notice of appeal filed in the court below — it has continued up the appellate ladder to this Court.

On August 18, 1983, the Fifth Circuit Court of Appeals entered its judgment granting Respondent's Motion to Dismiss Petitioner's untimely appeal from the district court's judgment in favor of Respondent. Petitioner took no further action until nineteen (19) days later when, on September 6,

1983, he filed his Motion to Vacate Order Dismissing Appeal, Motion to Reinstate Appeal and Motion for Rehearing ("Motion for Rehearing") in the court below. When Petitioner's Motion for Rehearing was denied on September 23, 1983, he delayed filing his Petition for Writ of Certiorari until December 20, 1983, over four (4) months after the entry of the initial judgment dismissing his appeal.

Pursuant to 28 U.S.C. § 2101(c), "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment or decree." When the time for seeking relief in this Court is fixed by statute, compliance with the statute is a jurisdictional prerequisite for review by this Court. *See Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412 (1943); *Department of Banking v. Pink*, 317 U.S. 264 (1942). Under the rules prescribed by this Court, however, the time period set forth by 28 U.S.C. § 2101(c) may be extended by the filing of a *timely* Motion for Rehearing. S. Ct. R. 20(4). Whether this Court may properly exercise jurisdiction in the case at bar thus depends on the timeliness of Petitioner's Motion for Rehearing in the court below, for if that motion was untimely it had no effect on the ninety day period set forth in 28 U.S.C. § 2101(c).

Rule 40(a) of the Federal Rules of Appellate Procedure provides that "a petition for rehearing must be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or local rule." In the case now before this Court, Petitioner's Motion for Rehearing was not filed until nineteen (19) days after the Court of Appeals entered its judgment dismissing his appeal and there is no indication that the time for filing a Motion for Rehearing was in any

way extended by the court below.[2] Thus, there was no tolling of the statutory ninety day period commencing August 18, 1983. Since the petition for certiorari in this case was not filed until one hundred and twenty-four (124) days after the dismissal of Petitioner's appeal, his petition is untimely and must, therefore, be dismissed for lack of jurisdiction.

Petitioner's discussion of the impropriety of the summary judgment entered by the district court is inappropriate — the only issue presented by Petitioner for review by this Court is the alleged error by the Fifth Circuit Court of Appeals in dismissing his appeal.

The sole question presented by Petitioner for review by this Court is whether the Fifth Circuit Court of Appeals erred in dismissing his untimely appeal from the district court's summary judgment in favor of Respondent. The merits of Petitioner's appeal from the district court's summary judgment are not in issue at this time. Petitioner, however, ignores this fact and improperly engages in a lengthy discourse of alleged error in the summary judgment entered by the district court in this case. Respondent refuses to participate in Petitioner's blatant misuse of the appellate process by responding to the arguments raised by Petitioner

[2] The fact that the Court of Appeals entertained the Motion for Rehearing is irrelevant. Prior to the revisions of the Supreme Court's rules in 1980, which were silent on the question of the effect of petitions for rehearing, there was limited authority that an untimely petition for rehearing considered and denied on the merits, extended the time for seeking review by this court. *See, e.g., Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952). The 1980 revisions, however, specifically deal with the effect of timely petitions for rehearing and unmistakably imply that regardless of the action of the lower court, an untimely motion for rehearing has no effect on the statutory ninety day period. *See* 12 J. MOORE, H. BENDIX & B. RINGLE, MOORE'S FEDERAL PRACTICE § 607.04[12] (2d ed. 1982).

with respect to the district court's action, other than to say that the district court's ruling was proper and came only after full consideration of Petitioner's position. Petitioner's discussion of matters not properly before this Court is unfortunate and unworthy of a substantive response.

CONCLUSION

Petitioner's application for a writ of certiorari is untimely and must be dismissed. In addition, the Petition fails to set forth any basis for invoking this Court's extraordinary certiorari jurisdiction, nor does it demonstrate any error in the decisions below. Respondent, therefore, respectfully requests that the Petition be denied at Petitioner's cost.

Respectfully submitted,

WILLIAM D. SIMS
(Counsel of Record)
CHARLES A. GALL
HARRY A. LIGHT

Attorneys for Respondent

Of Counsel:

JENKENS & GILCHRIST
2200 InterFirst One
Dallas, Texas 75202
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No. 83-1060

In The

Supreme Court of the United States

OCTOBER TERM, 1983

LYNN LAWTHER, JR.,

Petitioner,

v.

JACOBS MANUFACTURING COMPANY,

Respondent.

PROOF OF MAILING — AFFIDAVIT

I, William D. Sims, one of the attorneys for Jacobs Manufacturing Company, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of January, 1984, I deposited in a United States mailbox, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Brief for the Respondent in Opposition.

William D. Sims

Subscribed and sworn to before me, at Dallas, Texas, this ..... day of January, 1984.

Notary Public in and for
the State of Texas

My commission expires:

No. 83-1060

In The

Supreme Court of the United States

OCTOBER TERM, 1983

LYNN LAWTHER, JR.,

Petitioner,

v.

JACOBS MANUFACTURING COMPANY,

Respondent.

AFFIDAVIT OF SERVICE

I, William D. Sims, one of the attorneys for Jacobs Manufacturing Company, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of January, 1984, I served copies of the foregoing Brief for the Respondent in Opposition on the petitioner's counsel of record, by depositing same in a United States mailbox, with first-class postage prepaid, addressed as follows:

Frank P. Hernandez, Esq.
Hernandez, Inc.
1714 Browder
Dallas, Texas 75215

William D. Sims

Subscribed and sworn to before me, at Dallas, Texas, this ..... day of January, 1984.

Notary Public in and for
the State of Texas

My commission expires:

APPENDIX

U. S. District Court
Northern District of Texas
FILED
Apr. 8, 1983
Nancy S. Hall, Clerk
Deputy

In The

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYNN LAWTHER, JR.,

Plaintiff

v.

JACOBS MANUFACTURING COMPANY,

Defendant

CIVIL ACTION NO. CA-3-82-1196-D

ORDER

In response to a Motion for Summary Judgment filed by Defendant The Jacobs Manufacturing Company (Jacobs), Plaintiff Lynn Lawther, Jr., (Lawther) produced certain documents but indicated that he could better respond following further discovery. This action is set for trial April 25, 1983, and Lawther has not attempted to supplement his brief, to bring additional evidence to the Court's attention, or to comply with Local Rule 5.2, which requires a response to a motion for summary judgment to identify the disputed and material facts and the issues of law.

Lawther is hereby notified that the Court will consider Jacobs' motion without the benefit of additional input from him if no further response is submitted to the Court within five days of the date of this Order.

It is so ORDERED.

Dated this 7th day of April, 1983.

/s/ ROBERT M. HILL
United States District Judge